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to Mr Wattles
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DD/S SUBJECT FILE

OGC 71-0706

DD/S REGISTRY
FILE Medical

14 May 1971

MEMORANDUM FOR: Deputy Director for Support

SUBJECT: Functions of Agency Staff Physicians

1. You have asked our opinion on two problems affecting the functions of staff physicians of the Agency. First, does a privilege exist in communications between such physicians and those they deal with on behalf of the Agency? Secondly, can the Agency protect its physicians against malpractice suits by other employees or personnel the physicians deal with in connection with their duty to the Agency?

2. Privilege

a. At common law, communications made to a physician by a patient are not privileged. A number of states have passed laws prohibiting testimony by physicians concerning their patients unless the patient waives his privilege or the court believes the testimony is necessary to the disposition of the case.

b. We are not presently faced with this technical question of privilege in court but are concerned with the question of silence outside the courtroom. Every physician is deeply indoctrinated with the general ethical obligation to keep silent on what he learns from patients from verbal communications or observes from examinations and treatments. In this connection, the Principles of Medical Ethics provides:

> A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

c. In my opinion, information pertaining to important security implications concerning the Agency or pertaining to the national welfare come within the exception provided in the above quotation. Furthermore, the ethical privilege has been held not to exist when the purpose of the contact between the physician and the individual is for examination for which no advice or treatment is contemplated, particularly where the physician is engaged by another for the very purpose of reporting results of such examination and the individual is aware of this. In any case, we believe there is no legal recourse against the physician supplying information to the Agency under the circumstances set forth above.

3. Malpractice

a. A more serious legal problem is presented by the question of malpractice suits against Agency physicians. Malpractice and assault cases against physicians have been on the increase. The amounts of recoveries have jumped to huge sums, and adequate insurance is ever more difficult to obtain. To physicians in private practice this is indeed a very serious problem. Staff employees of the Agency, however, are in a very different situation with regard to any medical service performed in connection with their responsibilities to the Agency.

b. The courts have recently given very wide scope to such responsibilities. Thus, in the leading case in the Supreme Court, Barr v. Mateo, 360 U.S. 564 (1959), the court gave absolute privilege to a Government employee if his actions were "within the outer periphery" of his duties. To illustrate the Agency's attitude toward such

situations, we have had two court cases in the last few years. [redacted] STAT

TAT [redacted] We provided defense counsel, who introduced the "scope of employment" defense based on Barr v. Mateo cited above and made a motion for summary judgment. The motion was granted, an appeal was taken, the lower court was eventually upheld, and the Supreme Court denied certiorari. All expenses were paid by the Agency.

c. In another case, CIA and the Department of Defense had classified contracts with [redacted] AT

TAT [redacted]

AT [redacted] Later, Federal courts upheld this ruling even though the individual concerned was not a Government employee. It is inconceivable, therefore, that a staff physician of the Agency who was sued for an action taken by him in the interest of the Agency would not be fully backed and held harmless by the Agency. As stated in one case:

> To allow the fear or risk of personal liability for their official acts to inhibit . . . /Federal/ . . . doctors from performing their duty . . . would be contrary to the national interest. Gamage v. Peal, 217 F. Supp. 384 (N. D. Cal. 1962).

4. I believe, therefore, that our staff physicians should not be inhibited by fear of legal consequences from taking action on their own initiative or when requested when the action appears to pertain to security questions or administrative requirements of the Agency.

STA

LAWRENCE R. HOUSTON
General Counsel

SECRET/SENSITIVE/CODEWORD CLASSIFICATION/CONTROL AND DISSEMINATION

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OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	Director of Personnel		
2	[redacted] Headquarters		
3	Assistant Deputy Director		
4	for Support [redacted]		
5	Headquarters		
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

Dr requested.

Andy R. suggests that the problem is with each individual doctor. I'm not sure our doctors are reacting as individuals but rather in conformance with OMS policy. Perhaps (more)

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
DD/Pers/SP [redacted] STAT	30 MAR 1971

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Then our task is to resolve with OMS and OGC what medical ethics and legal responsibilities allow us to do in ~~a~~ emergency cases.

30 MAR 1971

MEMORANDUM FOR THE RECORD

SUBJECT: Conversation with Mr. Andrew D. Ruddock, Director, Bureau of Retirement and Insurance

1. As requested by the ADD/S, I called Mr. Ruddock for a discussion of any experience he might have had on problems arising from the use of physicians in certain types of situations. I gave him some examples of what I had in mind, such as the [redacted] problem (without mentioning names) and other instances where Agency duty officers in need of medical assistance or guidance find it necessary to consult an Agency physician.

2. Mr. Ruddock reported that BRI used to have a problem of physicians refusing to respond to calls for assistance from employees. He gave me one example of an employee who was sent to the Health Unit by his supervisor who felt that the employee was intoxicated. In turn, the nurse at the unit went to obtain the services of a physician. The physician refused to see the employee because he did not want to get involved in the question of an employee drunk on duty.

3. Mr. Ruddock indicated that he resolved this type of problem by making it perfectly clear to the physician what was expected of him. Some of Mr. Ruddock's physicians work on adjudications, some on other administrative tasks; others work in the Health Unit. When he makes it clear that it is a part of a physician's duty or responsibility to respond to calls for help or attention from employees, the physician is expected to render the necessary care. When Mr. Ruddock has his initial discussion with a physician concerning his duties, the physician has the opportunity at that time to raise questions of ethics or other reasons why he cannot perform. In the end, the physician has the choice of refusing the employment or resigning, if already on board. In effect, Mr. Ruddock reaches a clear understanding with the physician of the conditions of his employment before any incident arises. Doctors whose duties do not include providing the type of emergency service employees might need would have a right to refuse to render such care; on the other hand, doctors whose duties include this responsibility are expected to provide emergency care.

4. In our kinds of cases, Mr. Ruddock suggested that our attorneys review the extent to which liability, for the physician and the United States Government, is created when the physician responds to after-duty requests of the type we were discussing. There was little question in his mind, aside from the matter of possible legal liability, that the solution to our problem is for the Agency to reach a full and clear understanding with each physician of what is expected of him - in advance of any incident.

STA

Deputy Director of Personnel
for Special Programs